IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GALLEON S.A., BACARDI-MARTINI U.S.A., INC. and BACARDI & COMPANY LIMITED,	:	
Petitioners,	:	
- against -	:	Cancellation No. 24,108
HAVANA CLUB HOLDINGS, S.A. and HAVANA RUM & LIQUORS, S.A. d.b.a. H.R.L., S.A.,	:	
Respondents	:	

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION PURSUANT TO THE GOVERNMENT IN THE SUNSHINE ACT

Bacardi's opposition brief[1] does not dispute that Bacardi knowingly caused Florida Governor Jeb Bush to make *ex parte* communications to Director Rogan and Deputy Director Dudas in a covert attempt to influence the ultimate outcome of this proceeding in its favor. Nor does Bacardi dispute:

- the authenticity of the letters from Governor Bush attached to Respondents' motion at Exhibits D and F;
- that Bacardi itself authorized Governor Bush to make *ex parte* communications on its behalf, and that Governor Bush did so expressly (as Governor Bush himself had so stated in his letter to June 13, 2002 to Director Rogan);

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[1] Bacardi's brief dated September 25, 2002 ("Opp. Br.") seems intended to constitute a brief in opposition to Respondents' Motion Pursuant to the Government in the Sunshine Act. We treat it as such notwithstanding that its title ("Petitioners' Memorandum of Law in Support of its Motion to Strike Respondents' Motion for Purported Order to Show Cause and for Entry of Default Judgment") misleadingly implies that Bacardi is a moving party.

- the existence of a causal link between Governor Bush's actions and the more than $200,000 contributed to the Republican Party of Florida and 2002 Bush campaign by Bacardi and its top executives, as evidenced *inter alia* by the $50,000 contribution made by Bacardi just 10 business days before Governor Bush wrote to Director Rogan;

- that Deputy Director Jon Dudas has been providing Bacardi and Governor Bush with unspecified "continuing assistance," and therefore that there remain undisclosed *ex parte* communications between Bacardi and at least Mr. Dudas in connection with this proceeding; and

- that Director Rogan and Deputy Director Dudas appear to have violated the Government in the Sunshine Act by not disclosing to respondents both the *ex parte* communications they received from Governor Bush, and any other *ex parte* communications that they received from or made to Bacardi or its agents.

Under these circumstances, respondents could not be more entitled to the relief they seek, namely (a) full disclosure by all persons with knowledge, including Bacardi, Governor Bush, Director Rogan and Deputy Director Dudas, of the nature, extent and impact of all *ex parte* communications in this proceeding, (b) an order requiring Bacardi to show cause why its claims should not be dismissed due to the *ex parte* communications in this proceeding, and (c) suspension of this proceeding pending resolution of the foregoing.

Bacardi's opposition brief lacks any argument, defense, rationale or authority to justify a denial of Respondents' motion. Instead, Bacardi has merely thrown up countless diversions and misrepresentations of fact and law, so numerous and egregious as to warrant this reply.

1. Bacardi's first argument (Opp. Br. 3-4) is that the Government in the Sunshine Act does not apply to this proceeding because the USPTO is not an "agency" as defined in 5 U.S.C. §552b(a)(1). That definition, however, applies by its terms only "[f]or purposes of this section [552b]" — the Open Meetings Law — which is not at issue here. The definition of "agency" which does apply, by its terms, to the Government in the Sunshine Act, codified at 5 U.S.C. §557(d)(1), is the general APA statutory definition of "agency" in 5 U.S.C. §551(1) (providing definitions "for

the purposes of this subchapter [5 U.S.C. §§551-559]"). That definition encompasses the USPTO by its reference to "each authority of the Government of the United States." *See also, e.g., In re Sang-Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002) ("Tribunals of the PTO are governed by the Administrative Procedure Act"); *A.S. v. B.R.*, 1998 Pat. App. Lexis 10 (Board of Patent Appeals and Interferences Dec. 2, 1998) (enforcing the Government in the Sunshine Act within the USPTO).

The sole case cited by Bacardi throughout its entire opposition brief — *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D. Cal. 1993) — concerns only the Open Meetings Law, and not §557(d), and has nothing at all to due with the prohibition of *ex parte* communications in adjudicatory proceedings as this one.

2. Bacardi's discussion of TBMP §105 (Opp. Br. 4-6) — which applies by its terms to bar *ex parte* communications made or caused to be made by "practitioners" — may be intended to indicate that Bacardi's counsel procured Governor Bush's *ex parte* communications. That would not excuse them.[2] Whether occasioned by counsel or business personnel, the Sunshine Act mandates full disclosure of the extent, contents, purpose, and impacts of all *ex parte* communications.

3. Bacardi argues (at 3 and 5) that the *ex parte* communications were permissible because Director Rogan "is not a member of the TTAB." That argument is frivolous: the express terms of the Lanham Act make Director Rogan a member of the TTAB. 15 U.S.C. §1067 ("The Trademark Trial and Appeal Board shall include the Director, the Commissioner for Patents, the Commissioner for Trademarks, and administrative trademark judges who are appointed by the Director").

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[2] *See also* TBMP §115.02 ("The Commissioner may, after notice and opportunity for a hearing, (a) reprimand or (b) suspend or exclude, either generally or in any particular case, any individual, attorney, or agent shown to be incompetent or disreputable, who is guilty of gross misconduct, or who violates a Disciplinary Rule.").

4. Bacardi next argues (at 5-6) that the *ex parte* communications that Governor Bush (and others?) made on its behalf were permissible because they were made while this proceeding was suspended rather than "pending." This argument too is frivolous. A legal proceeding is "pending" at all times from its inception to its conclusion, including during a suspension. *See, e.g., Black's Law Dictionary*, Abr. Sixth Ed. (West Publ. 1991) ("pending" means "Begun, but not yet completed; during; before the conclusion of; . . . . an action or suit is 'pending' from its inception until the rendition of final judgment"). Indeed, Bacardi is estopped even from making its preposterous argument, as the point has already been ruled against it. In dismissing Bacardi's petition for review earlier this summer, the U.S. Court of Appeals for the Federal Circuit, aware that this cancellation proceeding was suspended, noted that "the cancellation proceeding initiated by Bacardi *is pending*." *Galleon, S.A. (Bacardi) v. Rogan*, 2002 WL 1905990 (Fed. Cir. No. 02-1289, July 31, 2002).

If more were needed, it specifically has been held that "suspension of proceedings does not abrogate the applicability of the *ex parte* rules codified in the Government in the Sunshine Act." *State of N. Car. v. Environmental Prot. Agen.*, 881 F.2d 1250, 1257 (4th Cir. 1989).

At bottom, Bacardi's argument — wholly unsupported by any authority — is that a party may attempt to corrupt a proceeding through *ex parte* communications to the decision-maker so long as the matter is suspended, even when that party has motions pending on which it is seeking action. Merely to identify the argument is to condemn it.

5. Bacardi next argues (at 6) that there was no violation of the Government in the Sunshine Act because Director Rogan's July 3, 2002 letter to Governor Bush "merely set out the status" of this proceeding. But the purpose and character of Governor Bush's letter is proven by its text, not by the written *ex parte* response Director Rogan made. Governor Bush's letter on behalf of Bacardi demanded, in its very first paragraph, that the PTO

> take quick, decisive action on a pending application [*i.e.*, the TTAB cancellation proceeding] *to expunge the registration of the trademark Havana Club.*

In case his meaning was not crystal-clear, Governor Bush repeated that demand in the very next sentence:

> The out-dated registration belongs to a company owned by Fidel Castro called CubaExport *and should be cancelled immediately.*

Given his repeated insistence on granting Bacardi the very relief it was seeking in its pending cancellation proceeding, there can be no question that Governor Bush's letters for Bacardi were intended to influence the outcome of this proceeding, and cannot be ignored as merely asking for a status report.[3]

Governor Bush's demand that Bacardi be given a favorable result in the TTAB proceeding, with irregular speed ("A swift resolution to this matter is imperative") and notwithstanding due process (damned as "lengthy bureaucratic procedures"), makes plain that the letter Bacardi had Governor Bush send to Director Rogan flagrantly violated the Government in the Sunshine Act, 5 U.S.C. §557(d)(1)(A). The Governor's July 16 reference to "continuing assistance" of Deputy Director Dudas appears to confirm the unlawful, and apparently corrupt, character of other *ex parte*

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[3] Bacardi, of course, had no reason to ask Director Rogan or any other member of the Board for information relating to the status of this proceeding, as Bacardi and its counsel at all times has had such information in their possession.

Moreover, even if Bacardi could permissibly have made a status inquiry, case law makes plain that it would have been improper for Bacardi to ask Governor Bush to do so on its behalf. *See, e.g., Amigos Broadcasting, Inc. v. Federal Commun. Comm.*, 696 F2d 128 (D.C. Cir. 1982) ("Interested persons are prohibited from making or soliciting any oral or written *ex parte* communications that go to the merits or outcome of a proceeding. Status inquiries are permitted by interested persons, but those same persons are prohibited from soliciting others to make the same inquiries. The reason for prohibiting those solicitations is clear. If acted upon, they raise doubts whether the purpose of the inquiry is to obtain information or to inform [the Agency] that prominent persons are taking an interest in a particular application, and undermine public confidence in the fairness of the [Agency] proceedings.") (internal quotation and citations omitted).

communications as well. (Deputy Director Dudas's "continuing assistance" is highly unlikely to have been merely further reporting on the status of events already reported on by Director Rogan in detail). In any event, the only way to assess the nature and extent of such "continued assistance," and of all other *ex parte* communications related to this proceeding, is by full disclosure by Bacardi and its counsel, and by any and all others who participated in making, receiving, or acting in connection with such communications, including without limitation Director Rogan and Deputy Director Dudas, and Governor Bush (and his staff).

Caselaw makes amply clear that respondents are entitled to such discovery pursuant to the Government in the Sunshine Act under the circumstances presented. The metaphor "Government in the Sunshine" was deliberate: where adjudicatory proceedings are concerned, it is the very purpose of the law to bring *all* secret communications and efforts to apply improper political influence to light. Moreover, when substantive *ex parte* communications have taken place, the law makes plain that full agency-compelled (or court-compelled) disclosure is essential not least because it is indispensable in determining whether the proceeding should be dismissed. In addition to the cases cited in Respondents' motion at 8-9 & n.4, *see, e.g.*, *In re Schiller*, Comm. Fut. L. Rep. (CCH) P29,104 (2002) (ordering CFTC staff to submit list of persons who made/received *ex parte* communications and copies of all written ex party communications involving such persons); *In re Wright*, CFTC No. 97-2, 1997 CFTC LEXIS 125 (1997) (recognizing that *ex parte* communications are far more egregious in adjudications than in rule-making; given the facts, "the Court [i.e., the ALJ] is duty bound to undertake further factual inquiry;" requiring disclosure, and contemplating possibility of "an evidentiary hearing to determine the nature, extent, sources, and effect of any and all *ex parte* communications"); *American Airlines*, FAA No. CP89EA0119, 1991 FAA Lexis 248 (1991) (recounting extensive informal procedures to ventilate *ex parte* communications and their

impact, which were held insufficient, and ordering agency to show cause why the matter should not be dismissed with prejudice); *Municipal Electric Utilities Ass'n*, 23 F.E.R.C. ¶61,302 (1983) ("we recognize that a knowing and willful violation of the *ex parte* rules may *in some circumstances* justify a decision adverse to the 'guilty' party, although not imposing that sanction on the facts presented).

6. Bacardi's opposition brief (at 6-7) concludes with a flash of chutzpah — a request for summary judgment in its favor. Aside from its absurdity under the circumstances of the *ex parte* communications thus far exposed, the request is procedurally improper and granting it would violate due process. Bacardi's summary judgment motion was suspended by the Board upon its filing and, as a result, never opposed or briefed. Moreover, the TTAB has not yet had briefing on, much less resolved, Bacardi's motion to substitute Cubaexport and resume proceedings, so that the current registrant is not yet a party and has not been heard from.

7. We will not descend to the mudslinging in which Bacardi engages, as if political invective about Cuba before a U.S. tribunal were a substitute for precedent or reasoned legal argument, but there are numerous factual errors in Bacardi's papers which, even though irrelevant. are so egregious as to warrant specific responses:

- Bacardi's repeated (and irrelevant) assertion that respondents committed a fraud on the U.S. government does not make it so. In fact, the United States District Court for the Southern District of New York refused to make any finding of fraud, despite repeated entreaties that it do so, *e.g., Havana Club Holding, S.A. v. Galleon S.A.*, 961 F. Supp. 498 (S.D.N.Y. 1997) ("I make no determination on the merits of Defendants' claim that the license was procured by fraud"), and eventually dismissed Bacardi's fraud claim, *id.*, 1998 U.S. Dist. LEXIS 4065, *7-*13 (S.D.N.Y. March 31, 1998).

- Notwithstanding Bacardi's assertion that Respondents have delayed this proceeding, the Board suspended this proceeding from March 17, 1997 to May 13, 2002 on *Bacardi's motion,* and from May 13, 2002 to the present because Bacardi filed a petition for review in the Federal Circuit seeking the identical relief sought here, which would have been dispositive of this proceeding had Bacardi had prevailed, which it did not.

- Bacardi's assertion that Cubaexport has refused to acknowledge the power of U.S. courts to decide ownership of U.S. trademarks cites no factual support, and is entirely fanciful.

- Bacardi's assertion that Cubaexport refused to appoint a registered U.S. representative is bizarre; the PTO's records reflect that it has done so. Nor has Cubaexport refused to submit to the jurisdiction of the PTO or U.S. courts; it has never been obliged to do so, and Bacardi has a motion pending, not yet briefed, that seeks precisely that substitution.

For the reasons set forth in respondents' moving papers, and those set forth above, the relief sought by respondents should be granted.

Respectfully submitted,

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Dated: October 1, 2002

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 1, 2002, a true and correct copy of the foregoing

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION PURSUANT TO THE GOVERNMENT IN THE SUNSHINE ACT

was served by first class mail on:

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